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In The

Supreme Court of the United States

October Term, 1974

No. 74-1157

IN RE: NATHAN BERLANT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 3

Constitutional Provisions Involved 4

Statement of the Case 4

Issues as Raised in the Courts Below 6

Reasons for Granting the Writ 10

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) 12, 13

Grunewald v. United States, 353 U.S. 391 (1957) ... 5, 7, 8, 12, 13

Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 ..... 12, 13

Contents

Page

In Re: Nathan Berlant, 458 Pa. ___, 328 A.2d 471 1

In Re: Winship, 397 U.S. 358 ..... 6, 7, 11

In the Matter of Ruffalo, 390 U.S. 544 ..... 6, 7, 10, 11

Spevack v. Klein, 385 U.S. 511 ..... 7, 13

Thompson v. Louisville, 362 U.S. 199 ..... 9, 10, 15

Statute Cited:

Act of June 25, 1948, C. 646, 62 Stat. 929 (28 U.S.C.A. Sec. 1257) 2

United States Constitution Cited:

Fifth Amendment 3, 6, 7, 8, 12

Fourteenth Amendment 3, 4

APPENDIX

Opinion of the Court of Common Pleas 1a

Opinion of the Supreme Court of Pennsylvania 20a

Concurring and Dissenting Opinion of Justice Manderino 35a

Order Denying Rehearing 40a

In The

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania in *In Re: Nathan Berlant* is reported at 458 Pa.____, 328 A.2d 471. This opinion is appended hereto. The opinion of the Court of Common Pleas of Philadelphia County is unreported and is appended hereto.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on October 16, 1974.

The order denying rehearing was entered on December 13, 1974, within ninety (90) days of the filing of this petition.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929 (28 U.S.C.A. Sec. 1257).

QUESTIONS PRESENTED

1. Does the Due Process Clause of the Fourteenth Amendment require that state courts, in attorneys' disbarment proceedings, apply the reasonable doubt test as the appropriate burden of proof?

2. Was petitioner's right to due process of law violated by the action of the prosecutor in bringing to the attention of the three judge disciplinary court the fact that petitioner had previously invoked his Fifth Amendment privilege with respect to one of the pending charges before the investigating judge in preliminary proceedings?

3. Was petitioner's right to due process of law violated by the action of the Pennsylvania courts in sustaining judgments of guilt on charges of solicitation of business and filing false retainer statements despite a total absence of evidence to prove an essential element of these charges; namely, petitioner's knowledge of the alleged solicitation involved?

CONSTITUTIONAL PROVISIONS INVOLVED

The following clause of the Fourteenth Amendment is involved:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner, an attorney in practice for twenty-one (21) years prior to the institution of the present proceedings, was charged before a Disciplinary Court in Philadelphia County, Pennsylvania, with professional misconduct, including fifteen (15) charges of solicitation of personal injury cases, of which twelve (12) were sustained by the Supreme Court: four (4) charges of submitting false medical bills on all of which he was acquitted; twelve (12) charges of submitting false retainer statements to the Court of Common Pleas of which ten (10) were sustained, two (2) charges sustained of attempting to impede a judicial investigation into his misconduct, five (5) charges of making improper advances to clients and one (1) charge of failure to file retainer statements required by a local rule of court.

Petitioner was also separately charged in another proceeding (consolidated for trial) with two (2) separate allegations of solicitation and related subornation of perjury, all of which he was adjudged not guilty.

Briefly summarizing the twelve hundred (1,200) pages of testimony, a dozen of respondent's clients testified that their personal injury cases had been solicited by persons other than respondent and referred to him. The third parties involved in the solicitation denied it and, although the record contains evidence which is adequate to sustain findings of solicitation by these third parties, there is no evidence showing petitioner's knowledge of misconduct on the part of the third parties involved. The Supreme Court of Pennsylvania, acknowledging the absence of direct evidence of such knowledge on the part of petitioner, attempts to sustain these findings on the basis of circumstantial evidence, namely, that things were done by persons around petitioner, of which the Court surmises he had to be aware, despite the absence of either direct or circumstantial evidence of such awareness.

In the course of appellant's hearing before the three-judge court, he was asked by counsel for the Special Prosecutor (R1214a)[1] whether he had given anything of value to anyone for referring a case to him. He answered: "No, sir." He was then asked whether he had been asked the same question before the Investigating Judge at an earlier date. Counsel for petitioner objected immediately and demanded that the Special Prosecutor be required to show he proposed to prove a prior inconsistency. The Special Prosecutor then offered to show "that he was asked the same question before Judge Shoyer and pleaded the Fifth Amendment." This was objected to on the basis of this Court's decision in *Grunewald v. United States*, 353 U.S. 391 (1957). Counsel for petitioner moved for a mistrial on the ground that, although the objection was sustained, the Special Prosecutor

1. Page numbers "R—a" refer to Record on Appeal.

had succeeded in making the Trial Court aware of the fact of petitioner's prior plea of the Fifth Amendment (R1218a).

Throughout the proceedings petitioner contended that, attorneys' disciplinary proceedings being quasi-criminal, the proper burden of proof was the reasonable doubt test. This suggestion was uniformly rejected by the Pennsylvania courts which held that a preponderance of clear and satisfactory evidence was the appropriate standard.

ISSUES AS RAISED IN THE COURTS BELOW

1. As to the burden of proof, the issue was stated in petitioner's brief in the Pennsylvania Supreme Court in the following language (and in substantially the same language in his brief in the Court of Common Pleas):

> "We would suggest that even this standard (preponderance of clear and satisfactory evidence) is constitutionally insufficient in view of the holding in *In the Matter of Ruffalo*, 390 U.S. 544, to the effect that disciplinary proceedings are 'of a quasi-criminal nature' requiring procedural due process which we believe entails proof beyond the reasonable doubt. *In re: Winship*, 397 U.S. 358, 366."

The Supreme Court of Pennsylvania rejected petitioner's contention as follows:

> "Initially, appellant contends that the proper standard of proof in disciplinary proceedings is

> the 'reasonable doubt' standard. We disagree. Disciplinary proceedings are not criminal in nature; hence, the reasonable doubt standard does not apply."

Petitioner reiterated this argument in his petition for reargument, again specifically arguing the holdings in *Ruffalo* and *Winship*, where this Court held that the Due Process Clause protects the accused in a quasi-criminal (juvenile) proceeding against conviction except upon proof beyond a reasonable doubt. The petition for reargument was denied without opinion.

2. As to the use of petitioner's prior plea of the Fifth Amendment, petitioner complained in his briefs in both Pennsylvania courts that under the specific holding of this Court in *Grunewald v. United States*, 353 U.S. 391, that "it was prejudicial error for the trial judges to permit cross-examination of petitioner on his plea of the Fifth Amendment privilege . . ." and the more recent decision of this Court in *Spevack v. Klein*, 385 U.S. 511, holding that no disciplinary action against a lawyer could be predicated upon his plea of the Fifth Amendment. It was a clear due process violation to permit this prior plea to be brought to the attention of the Trial Court which was sitting as judge and jury in petitioner's case.

The Supreme Court of Pennsylvania rejected this contention because it stated "there was no possibility of prejudice since the objection was promptly sustained before any evidence of appellant's prior Fifth Amendment plea could enter the record in the case" (24a).[2] It is small consolation and

2. Page numbers "—a" refer to Appendix herein.

certainly no legal answer to petitioner's contention that the Lower Court sustained the objection after hearing a full description of precisely the circumstances in which petitioner had previously invoked the Fifth Amendment. The triers of fact learned what had happened and there can be very little doubt that it was deliberately done by the cross-examiner because he asserted this Court's *Grunewald* decision in support of his untenable position.

The contest in the Lower Court was largely one of credibility on many issues and the Supreme Court of Pennsylvania is in effect saying that error of constitutional proportion is of no consequence where the trial judges, sitting as a jury, sustain an objection to the improper introduction of evidence after they have heard it. The Trial Court in its opinion nowhere suggested, nor did the Supreme Court of Pennsylvania find or even imply that the Court's decision had not been influenced by this episode in the trial. The Supreme Court of Pennsylvania disposes of the argument as follows (24a):

> "We find this argument meritless. Counsel for appellant objected at the outset of this line of questioning before appellant had responded and his objection was sustained at that time. There was no possibility of prejudice since the objection was promptly sustained before any evidence of appellant's prior Fifth Amendment plea could enter the record in this case."

3. Appellant has contended throughout the proceedings below that he was adjudged guilty of solicitation and filing false

retainer statements based upon evidence solely that third parties may have indulged in solicitation of cases and referred these cases to him or persons in his office without his knowledge and that the retainer statements required by the Court of Common Pleas reciting the names of the parties referring clients, to the extent that they were inaccurate, were so without appellant's knowledge. The lower courts held him responsible for the conduct of these other people, some of whom were clients of petitioner and some employees, despite the fact that all the evidence on the issue of petitioner's knowledge of the manner of the referrals was to the effect that he had no such knowledge.

The courts of Pennsylvania have previously denied absolute vicarious liability in disciplinary matters and do not pretend to change that rule in the instant case. However, they have permitted these findings of guilt to stand despite the fact that there is a total absence of evidence in this record to sustain a finding on this essential element of the charges. Petitioner, of course, argued the insufficiency of the evidence in his brief and argument in the Court of Common Pleas and objected in constitutional terms on the basis of this Court's decision in *Thompson v. Louisville*, 362 U.S. 199.

The Supreme Court of Pennsylvania rejected appellant's contention in the following terms (22a):

> "We now address appellant's questions relating to the type of evidence necessary to sustain certain charges herein. Generally, appellant contends the absence of direct evidence of his involvement in certain offenses charged preclude a finding of

> guilt in those matters. For instance, appellant refers to a number of cases in which an associate under his employ was the person who actually prepared some of the contingent fee agreements for which the court below held appellant responsible. Appellant's attempt to shield his guilt in this matter is unavailing. The fact that an attorney may not have dirtied his hands with the manual task of filling in forms does not necessarily relieve him of culpability any more than would the use of 'runners' to avoid direct involvement in solicitation. If, under the circumstances, it is reasonable to infer that the action was taken at the party's direction or with his approval, the fact finder may draw such inference for the finding of guilt."

The Supreme Court of Pennsylvania again implicitly rejected petitioner's renewal of this contention in his petition for reargument in its denial without opinion of that petition despite the contention that the inference sanctioned by the Court was totally without evidentiary support and in violation of the rule of *Thompson, supra.*

REASONS FOR GRANTING THE WRIT

1. This Court has held in *In the Matter of Ruffalo,* 390 U.S. 544, that attorneys' disciplinary proceedings are quasi-criminal in nature for the purpose of due process requirements. This Court has also held that quasi-criminal proceedings, as that term has been used in its application to juvenile matters, carries

with it the corollary proposition that due process requires the application of the reasonable doubt standard as the burden of proof. This Court has recognized, in *Ruffalo* and other decisions, that, while disciplinary proceedings look in part to the protection of the public, they, nevertheless, apply a penalty to the lawyer involved of very substantial proportions in denying his right to pursue his chosen profession and earn a livelihood through the practice of law.

Petitioner submits that the earlier decisions of this Court recognizing the nature of disciplinary proceedings and the seriousness of the consequences to the lawyer involved argue strongly that the protection accorded juveniles by the interpretation of the quasi-criminal designation in *Winship* argues forcefully for the application of the same burden of proof as a constitutional matter in attorneys' disciplinary proceedings. The Supreme Court of Pennsylvania has clearly and definitively rejected that argument in this case and the issue is squarely presented by the judgment which petitioner seeks to have reviewed. The solicitation of cases by laymen for a lawyer is a criminal offense in Pennsylvania and the lawyer who connives with a layman to procure such solicitation is guilty of conspiracy to violate Pennsylvania Penal Code. Petitioner, in these proceedings, has been charged with this offense and suspended for a period of five (5) years on account thereof and yet the preponderance of evidence test has been upheld as applicable in these proceedings. Petitioner respectfully suggests that this decision of the Supreme Court of Pennsylvania is clearly at odds with the implications of this Court's earlier decisions, including *Ruffalo* and *Winship*.

2. The issue of the use of appellant's prior plea of the Fifth Amendment in a calculated effort to prejudice him in the eyes of the Trial Court flies squarely in the teeth of this Court's decision in *Grunewald, supra,* and the principles subsequently laid down in *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), where this Court stated:

> "For comment on the refusal to testify is a remnant of the 'inquisitorial' system of criminal justice which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."

The Supreme Court of Pennsylvania, noting that petitioner's objection to this line of questioning was sustained concludes that no prejudice ensued from bringing to the attention of the triers of fact appellant's prior claim of the privilege. The Court does not pretend to weigh the evidence in the case against the probability of influence upon the triers of fact of the introduction of this incident into the trial. It merely draws its conclusion from the fact that the objection was sustained. Assuming as we do that the introduction of this material was error of constitutional proportion, then it imposed upon both the Court of Common Pleas and the Supreme Court of Pennsylvania a duty to determine that the error was harmless beyond a reasonable doubt before it could be dismissed as nonprejudicial. See *Harrington v. California,* 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284, but no such equation was attempted by the Supreme Court of Pennsylvania in this case.

The unspoken premise of the action of the Supreme Court of Pennsylvania appears to be that experienced trial judges are not as susceptible to the influence of improper evidence as a jury might be and that the Trial Court's rejection of the proffer of evidence indicated a frame of mind disposed not to consider it. The unfortunate aspect of these assumptions is that they are not borne out by the record. The Trial Court sustained that objection and refused a request for mistrial without any statement that it would not consider all that it had heard. And it heard (R1214a-1219a) a considerable description by the Special Prosecutor of precisely what he intended to prove. The result is that the court-jury heard the inadmissible evidence and an argument based thereon and left the petitioner totally unprotected, giving no indication what, if any, influence was wrought by the inadmissible offer.

The Supreme Court of Pennsylvania failed to apply the appropriate constitutional standard in the assessment of the effect of this misconduct by the Special Prosecutor upon either the actuality or the appearance of fairness in the Trial Court. The rule thus applied by the Pennsylvania courts is that if a Trial Court without a jury hears an offer of inadmissible evidence of constitutionally erroneous proportions and merely sustains an objection, though all of the prejudicial material is heard, no error may be complained of and no constitutional assessment of prejudice is required. We submit that this is short shrift to be given to a matter as important as this Court's decisions in *Grunewald, Griffin* and *Spevack* would indicate, and the constitutionally required assessment of prejudice established by this Court in *Harrington v. California, supra,* is totally ignored. Petitioner respectfully suggests that deference to

the constitutional issue requires more than this to be consistent with the prior decisions of this Court. The issue is squarely presented by the ruling of the Supreme Court of Pennsylvania that the mere sustaining of the objection eliminates prejudice. We submit that this untenable proposition is at variance with the cited decisions of this Court.

3. The issue of the constitutional sufficiency of the evidence, *i.e.*, whether there is any evidence at all to support an inference of petitioner's knowledge of the solicitation with which he is charged and knowledge of the inaccuracy of the retainer statements he is charged with having filed, poses a serious question of due process. The issue is highlighted by the refusal of the Pennsylvania courts to adopt the reasonable doubt standard for disciplinary proceedings. It appears to petitioner that because the preponderance test has been used, the Pennsylvania courts in this case have relaxed in their obligation to review the evidence (the Supreme Court review in this case is *de novo* under Pennsylvania law (25-6a)) and the Pennsylvania courts have permitted appellant's conviction on the two most serious charges without any evidence, direct or circumstantial, against him. This record shows that although the two clients of petitioner who may have solicited personal injury cases, did so, they did not act at petitioner's direction or with his knowledge and his employees who accepted the retainers and executed the forms of contingent fee agreement filed with the Common Pleas Court may well have been equally innocent of knowledge of the solicitation.

Petitioner respectfully suggests that what the Supreme Court of Pennsylvania describes as circumstantial evidence is

merely that people around petitioner participated in the conduct alleged and he is tainted by the fact that his office accepted solicited cases and he profited from them.

Because these are penal proceedings, petitioner suggests the *Thompson* scrutiny should be applied and we further suggest that this record does not withstand such review.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue its writ of certiorari to the Supreme Court of Pennsylvania to review the instant case and hear and determine the constitutional issues presented.

Respectfully submitted,

s/ John Rogers Carroll
Attorney for Petitioner

APPENDIX
OPINION OF THE COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

IN RE: JANUARY TERM, 1972

NATHAN BERLANT NO. D-20

OPINION AND ORDER

DOTY, A.J.
McDEVITT, J.
ROSENBERG, J.

April 13, 1973

This matter is before the Court for consideration of petitions for the discipline of respondent, Nathan Berlant, a member of the Philadelphia Bar. An Answer and New Matter was filed and, in addition, the respondent filed several pre-trial motions, namely, a motion to recommit this matter to the pre-hearing Judge, a motion for discovery and a motion for a bill of particulars. These pre-trial motions were argued before this Court. The motion to recommit was denied. The other motions were granted to the extent of ordering petitioners to provide respondent with copies of all depositions and written statements which had been obtained from witnesses which petitioners intended to call at the hearing before us.

Opinion of the Court of Common Pleas

The matter then proceeded to a hearing before this court, at which time extensive testimony was heard. We have received briefs and have also heard oral argument by counsel. After a careful consideration of the entire record and the applicable law, we are convinced that the prayer of the petitions should be granted and the respondent disciplined.

At the outset, the background to this matter must be set forth at some length so that a proper perspective can be fully appreciated.

In February, 1970, Morton S. Jaffe, Esquire, was engaged by the Philadelphia Bar Association as Special Counsel to conduct an investigation into unethical solicitation of cases by Philadelphia lawyers. After nineteen months, he was forced to discontinue his still uncompleted investigation because the funds provided by the Association were exhausted. He issued a report dated March 1, 1971, designated as *"Report to the Committee of Censors of the Philadelphia Bar Association of the Investigation Into Unethical Solicitation."* This report was sharply critical of the activities of a number of lawyers and some were charged with the commission of serious violation of the Canons of Professional Ethics.

On April 26, 1971, President Judge D. Donald Jamieson, on motion of the Committee of Censors of the Philadelphia Bar Association, issued an Order setting forth the procedures to be followed by the Committee of Censors in the filing of a Petition for Discipline which provided that the respondent-attorney shall be accorded a full adversary hearing before a panel of three (3)

Judges of the Special Disciplinary Court designated by the President Judge.

On August 19, 1971, the President Judge, D. Donald Jamieson, issued an Order transferring responsibility for the investigation into alleged solicitation of negligence cases from the Committee of Censors to Special Counsel to be appointed by the Court. The Order provided that Special Counsel shall have the responsibility of reviewing, investigating and completing the Bar Association's interim report known as the "Jaffe Report," and of presenting to the Court those cases in which disciplinary action by the Court is deemed appropriate.

On September 23, 1971, the Board of Judges of the Court of Common Pleas of Philadelphia approved a Resolution authorizing the President Judge to (a) engage Special Counsel to continue the investigation which had been started by Mr. Jaffe; and (b) to promulgate rules and regulations governing the powers of Special Counsel and the procedures to be followed in disciplinary cases.

Pursuant to this Resolution, the President Judge on October 28, 1971, issued an Amended Order. Section 3 of this Amended Order provided that Special Counsel shall be governed by the following procedure:

a. Witnesses having relevant evidence summoned by Special Counsel, including the attorney under investigation, shall be examined ex parte under oath before a judge of this Court appointed for that purpose by the President Judge.

b. The judge so appointed shall consider the evidence adduced before him with respect to any member of the Bar of this Court and, if he concludes that such evidence warrants the institution of formal charges against one or more members of the Bar of this Court, shall so certify to the President Judge who shall appoint a three judge panel to conduct such formal proceedings and to impose such discipline as may be warranted by the evidence.

c. The judge so appointed may, at any time while the matter is still pending before him, enter an order imposing discipline stipulated by the attorney under investigation and Special Counsel if, on the basis of the evidence adduced before him, the judge so appointed finds that justice will adequately be served thereby.

Section 5 provided that Special Counsel is granted the power to compel the appearance of relevant witnesses and the production of relevant evidence by subpoena.

Section 10 provided that, upon taking the proper oath of office, Michael Franck, Special Counsel, is admitted to practice specially for the purpose of conducting the investigation and any formal disciplinary proceedings arising therefrom.

On November 9, 1971, Judge Kendall H. Shoyer was appointed by the President Judge to hear and determine all matters presented to the Court pursuant to the Amended Order of October 28, 1971.

Opinion of the Court of Common Pleas

Among other lawyers investigated, the Committee of Censors of the Philadelphia Bar Association and Special Counsel investigated the activities of the respondent in regard to his alleged unprofessional conduct. Witnesses testified before Judge Shoyer and, as a result of that hearing, Judge Shoyer certified this matter to President Judge Jamieson. Judge Shoyer determined, after reviewing the evidence before him, that further proceedings were warranted and that a special disciplinary court should be convened to hear all the evidence and make a determination as to whether discipline should be imposed. President Judge Jamieson ordered the convening of this disciplinary court.

The petition filed by the Committee of Censors charges respondent with improper solicitation of the representation of Viola Woodland and Clarice Chambers (nee Palmer) and subornation of perjury.

The second petition, that of the Special Counsel, charges a series of improper solicitations, some of which also involve the filing of false contingent fee agreements, together with four charges of submission of false medical bills, the failure to make timely filings of contingent fee agreements in a number of cases, and making improper monetary advances to certain of the clients involved. That petition also alleges two attempts to impede the special investigation.

A disciplinary proceeding is not governed either by the Rules of Civil Procedure or by the Rules of Criminal Procedure. Disciplinary proceedings have been referred to as quasi criminal

proceedings. *In re Ruffalo,* 390 U.S. 544 (1968). There is no right to a jury trial and the quantum of evidence required to support disciplinary charges differs from that required either in a civil or in a criminal proceeding. To sustain the charges in a disciplinary proceeding, the proof is not required to be beyond a reasonable doubt or by a preponderance of the evidence but rather *by a preponderance of the evidence, which must be clear and satisfactory. Krehel Appeal,* 419 Pa. 86 (1965). In short, a disciplinary proceeding is sui generis.

The power of the Court to supervise the conduct of lawyers practicing before it does not rest on statute. It has always been recognized and has been articulated in a number of decisions of the Supreme Court of the United States holding that courts may pass upon the qualifications of persons admitted to practice before the courts. *Konigsberg v. State Bar of California,* 366 U.S. 36 (1961); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957).

Of course, the right to practice law is a constitutionally protected right and an attorney cannot be deprived of such right except by due process of law. *In re: Ruffalo,* 390 U.S. 544 (1962); *Schlessinger Appeal,* 404 Pa. 596. He must be accorded the privilege against self-incrimination. *Spevack v. Klein,* 385 U.S. 511 (1967). He cannot be compelled to testify and no unfavorable inference can be drawn from his failure to testify. *Griffin v. California,* 380 U.S. 609 (1965).

The area of contingent fees has long been particularly sensitive because of pervasive abuses by some lawyers who

practice in the personal injury field. The Courts and the Bar Association in Philadelphia have waged a long and generally unsuccessful struggle to require complete and total compliance with ethical standards.

Rule 202 of the Pennsylvania Rules of Civil Procedure was adopted to require lawyers who accept personal injury cases on a contingent fee basis to keep records which are open to inspection by the Court. This rule was broadened in Philadelphia by the adoption of sub-sections (e) and (f) which require (1) a statement by the client of the person who recommended the lawyer as well as the relationship between client and recommendor (generally referred to as Contingent Fee Agreements), and (2) filing copies of distribution statements.

Since the great majority of contingent fee agreements represent honest and ethical professional representation with no element of improper solicitation or other improper activity, the regulation is not per se a requirement that reaches criminal activities, or activities subject to discipline. A lawyer who believes that in a particular case the filing of a contingent fee agreement may subject him to criminal charges or charges of professional misconduct may attempt to assert his privilege and refuse to file the agreement. *United States v. Sullivan,* 274 U.S. 259 (1927). However, the privilege is not available with respect to records that are required to be kept and reporter for a non-criminal public purpose. *Shapiro v. United States,* 335 U.S. 1 (1948). To hold that the reasonable requirements of Rule 202 violate the privilege against self-incrimination would indeed be, in the words of Justice Holmes, "an extreme if not extravagant

application of the Fifth Amendment." *United States v. Sullivan, supra.* Mr. Justice Harlan, in his dissenting opinion in *Spevack v. Klein,* at page 523, said:

> "It cannot be claimed that the New York rules at issue here (rules substantially similar to our Rule 202) compendiously aimed at 'ambulance chasing' and its attendant evils are unimportant or unrelated to the protection of legitimate state interests."

The leading case in Pennsylvania with respect to disciplinary proceedings is *In re Disbarment Proceedings,* 321 Pa. 81 (1936). In that case the court said, at page 101:

> "It is the right and duty of the court to discipline its members who appear before it guilty of wrongdoing. *In re Davies,* 93 Pa. 116; *Wolfe's Disbarment,* 288 Pa. 331. Courts have an inherent power to make and follow rules governing such matters or to formulate new rules as the case demands so long as no right of the member charged is invaded. But the rules thus established do not restrict the general power of the courts; the power which establishes such rules in the first instance also enables the courts to disregard such rules and adopt the methods most suitable for the occasion. A court may conduct a general investigation of unprofessional conduct in an effort to rid the practice of undesirable

members: *People v. Culkin*, 248 N.Y. 465. It has always been proper for a court on its own motion to issue a citation against practicing lawyers: *Ex parte Steinman*, 95 Pa. 220; *Maginnis's Case*, 269 Pa. 186; *Snyder's Case*, 301 Pa. 276."

Thus, the contention that there was no power to change the procedures provided for in *Rule 200 pertaining to discipline has no validity. The Order of October 28, 1971 issued by the President Judge was issued pursuant to a Resolution of the Board of Judges adopted on September 23, 1971, authorizing the President Judge to issue the Order. *Rule 200 is not a rule of statewide application, but a rule of the Common Pleas Court of Philadelphia. The Board of Judges which adopted the rule may, of course, alter or change it at any time.

The Supreme Court of Pennsylvania issued rules effective March 21, 1972 (Supreme Court Rule 17-1 to 17-25) establishing a Disciplinary Board with full powers in disciplinary proceedings against any attorney admitted to practice law in the Commonwealth. The rules were adopted pursuant to the power vested in the Supreme Court by Section 10(c) of Article V of the Constitution of Pennsylvania, which includes the power to supervise the conduct of attorneys who are its officers.

Section 16(f) of the Schedule to the Judiciary Article (Article V) vests in the President Judge of the Court of Common Pleas of Philadelphia power to supervise the Court's judicial business, which includes the power to supervise the activities of lawyers practicing before the Court.

Opinion of the Court of Common Pleas

Thus, the power of the Supreme Court to supervise the conduct of attorneys on a state-wide basis as set forth in Section 10(c) of Article V, is accorded to the President Judge of the Court of Common Pleas with respect to Philadelphia by Section 16(f) of the Schedule to Article V.

The President Judge has the power to conduct a general investigation either by members of the Court or by Special Counsel. He has the power to authorize all procedures necessary to make the investigation effective, including the issuance of subpoenas by Special Counsel.

Normally, any local rule is superseded by a rule of general application issued by the Supreme Court. However, Rules 17-25 provide that the Supreme Court Rules shall not apply to any special judicial investigation in existence at the time of adoption of the Rules, and such special judicial investigations and any disciplinary proceedings arising therefrom shall be concluded under the procedures established for the conduct of such investigation.

Thus the procedures established by the Amended Order of October 28, 1971 are expressly authorized as far as the current investigation and disciplinary proceedings arising therefrom are concerned.

In this case the court adhered scrupulously to all requirements of procedural and substantive due process. Respondent was given copies of all statements made by witnesses who were called at the hearing. The investigation and

subsequent disciplinary proceedings did not violate any statute or rules of procedure and respondent was afforded his constitutional rights at all times.

Turning our attention first to the petition of the Committee of Censors, that petition charges that respondent improperly solicited the personal injury cases of Viola Woodland and Clarice Palmer on February 3, 1963. It also charges that on January 4, 1971, the respondent suborned perjury in that Viola Woodland was urged to and did testify falsely during the trial of her case. The petition further charges that respondent also suborned Viola Woodland to give him a false affidavit.

The petition of the special committee charges respondent with fifteen counts of improper solicitation, eleven counts of filing a false contingent fee agreement, making improper monetary advances in five counts, and two counts of impeding the court's investigation. It also charges respondent with three counts of submitting fraudulent medical evidence and failure to file approximately one hundred and ten contingent fee agreements and twenty-one statements of distribution as required by Philadelphia Rule 202 of the Pennsylvania Rules of Civil Procedure.

Obviously with this multitude of charges, the court cannot set forth in detail the evidence heard in support thereof. A pattern has emerged, however, which proves beyond peradventure of doubt that respondent employed several persons to solicit personal injury cases on his behalf. Among those so employed were James Ghilyard, his wife Frances, and Wilbur Allen.

Opinion of the Court of Common Pleas

In both the Palmer and Woodland case, for example, an unidentified man offered to drive them home after they had been discharged from the hospital following injuries sustained in an automobile accident. This man gave Clarice Palmer respondent's business card. As a result, the respondent talked to Clarice Palmer and, after obtaining from her Viola Woodland's name, appeared at Mrs. Woodland's apartment "as your lawyer." Respondent obtained a power of attorney from both individuals and in fact called a physician to visit Mrs. Woodland.

In these cases, as in all other cases considered by this court, respondent and the person acting for him as solicitor were unknown to the clients at the time of the first contact. In the Canty, McCullough and Roger Williams cases, James Ghilyard appeared on the scene of the accident shortly after it had occurred and solicited the case on respondent's behalf.

In the Tate case, Ghilyard visited the client's home and solicited the case. In each of these four cases, Ghilyard made follow-up contacts with the clients in his pursuit of these cases on respondent's behalf and in several instances drove the clients to respondent's office and back to their homes after they had signed respondent's retainer.

In the cases of Emily Butts, Willie Butts, Bernard Coleman, Mary Coleman and Glendora Burton, all five clients were solicited for respondent by Wilbur Allen. All five were strangers both to Allen and respondent at the time of the initial contact. The solicitor contacted each of these individuals and urged them to retain respondent as their lawyer in their claim for damages as

a result of injuries sustained while passengers on a Public Service Transport bus in New Jersey.

The same pattern holds in regard to the other clients of respondent which forms the basis of the charges against him of improper solicitation.[1] We must emphasize that in each of those cases neither respondent nor his solicitor were known to the potential clients at the time of the first contact.

Respondent contends that petitioners have presented no proof that he gave the solicitors anything of value for referring the cases to him. There is no merit to this contention. The evidence is such that this court has no trouble inferring therefrom that the solicitors did receive something of value for their time, efforts and expense on respondent's behalf.

Moreover, the Code of Professional Responsibility does not require actual proof of monetary payment in order for an attorney's action to fall within the ambit of unethical conduct. The policy against solicitation has its origins in the common law prohibition against barratry and champerty and is founded on the public policy against the stirring up of litigation. (See also *Klensin v. Board of Governors*, 312 Pa. 564 (1933).

We also find as a fact that in ten cases respondent filed a false retainer agreement under Philadelphia Rule 202.[2] In most

1. We conclude, however, that the evidence does not support the charge in the Reginald Pratt case and no evidence was presented in the Melvin Valentine case. Those two matters, therefore, cannot form the basis for the imposition of any discipline in this case.

2. No evidence was presented in the eleventh case, that of Melvin Valentine.

instances the falsity concerned the name or relationship of the person who was alleged to have referred the client to respondent.

In five instances the respondent improperly advanced monies to clients during the pendency of the litigation. Disciplinary Rule 5-103(B) flatly prohibits advances except in certain situations not here relevant. It is no defense, as respondent contends, that the clients were poor people in need of financial assistance.

The respondent is also charged with two counts of impeding the court's investigation and the evidence supports each charge. The respondent's conduct was in clear violation of Disciplinary Rule 1-102(4) and (5). In the Formosa case, the respondent attempted to influence Formosa's testimony after the latter was subpoenaed to appear in the course of the investigation. Respondent told Formosa to state falsely that he had known respondent for a number of years, that he had met him in respondent's father's grocery store, had obtained respondent's business card at that time, had kept that card for six years and had used the card to call respondent. Without question, respondent's conduct in this regard was utterly reprehensible and must be severely condemned.

The same is true with regard to respondent's conduct in the case of Charles Henry who was served with a subpoena to appear in the office of Special Counsel on February 4, 1972. Mr. Henry did not so appear because he was instructed by respondent that he need not do so and respondent gave that advice without first contacting either Special Counsel or the court.

We also find as a fact that the evidence in two cases supports the charge of submitting false and fraudulent medical evidence.[3] Respondent thus has violated Disciplinary Rule 1-102(4) of the Code of Professional Responsibility.

In the case of Robert and Ernestine McCullough, these individuals were referred to Dr. Milton L. Bluitt by respondent's employee, Armand Del Buono, who gave them a note with instructions to go to the physician and tell him that respondent was their attorney. Mrs. McCullough testified that she was treated by Dr. Bluitt "seven or eight times." However, respondent submitted Dr. Bluitt's bill to the insurance carrier for $230.00 covering twenty visits. The clients had no knowledge of the doctor's bill before respondent submitted it. At the settlement distribution conference respondent reduced the doctor's bill after the clients complained.

In the Tyrone Pearson case, respondent referred the client's mother to Dr. William Lee Jones for treatment of Tyrone's injuries. Dr. Jones was a stranger to Mrs. Pearson and her son prior to that referral. The respondent thereafter submitted a bill to the insurance carrier showing fifty-five visits to Dr. Jones by Tyrone Pearson with the amount of the doctor's fee stated at $396.00. Mrs. Pearson testified that this bill was a false statement of the number of visits which her son had made to the physician and we find this testimony credible and worthy of belief.

The respondent took the witness stand in his own defense in this case. He categorically denied that he had suborned perjury

3. The evidence does not support this charge in the case involving Frank Williams.

and also denied that he engaged anyone to solicit cases on his behalf.

We find the testimony of respondent to be not credible and unworthy of belief on a number of crucial issues.

As set forth in this opinion, the evidence amply establishes the vast bulk of the charges which had been leveled against respondent. There is absolutely no merit to his contention that there is insufficient evidence to find him guilty of wrongdoing.

In summary, in regard to the petition of the Special Counsel, we find that respondent is guilty of engaging in improper solicitation of clients on thirteen occasions in violation of Disciplinary Rule 1-102(2) and Disciplinary Rule 2-103(A).

We find respondent guilty of filing false retainers in ten instances in violation of Disciplinary Rule 1-102(A)(4).

We find respondent guilty of making improper monetary advances to clients during the pendency of litigation in the five instances charged in violation of Disciplinary Rule 5-103(B).

We find the respondent guilty of the two charges of impeding the court's investigation in violation of Disciplinary Rule 1-102(4)(5).

We find as stated hereinabove respondent guilty in two instances of presenting fraudulent medical statements and bills on behalf of clients in violation of Disciplinary Rule 1-102(4).

Opinion of the Court of Common Pleas

We find respondent guilty of failure to file one hundred and ten Contingent Fee Agreements and twenty-one statements of distribution as required by Philadelphia Rule 202 of the Pennsylvania Rules of Civil Procedure. In this regard the respondent did not file the aforesaid until after he was called before Judge Shoyer in April, 1972. The respondent's conduct is in violation of Disciplinary Rule 1-102(A)(5).

In summary, in regard to the petition of the Committee of Censors, we find the respondent guilty of improper solicitation in the cases of Viola Woodland and Clarice Palmer, and we further find respondent guilty of suborning the perjury of Viola Woodland.

We now come to the most difficult question of what discipline to impose upon the respondent in this case. This court is charged with the awesome responsibility of determining what action should be taken against a member of the Bar. We are cognizant of and sensitive to the fact that our decision will deeply affect his entire life. We are mindful of the many years of study a lawyer must undertake before he is admitted to practice and are not unaware of the fact that respondent has engaged in the practice of law for twenty-one years apparently without any prior complaint having been lodged against him. Moreover, a number of witnesses presented reputation evidence on respondent's behalf and we have taken this evidence into consideration as well in determining what discipline should be imposed in this case.

Opinion of the Court of Common Pleas

Under all the circumstances and after painstaking consideration, we have determined that the respondent shall be suspended from the practice of law for a period of five (5) years.

THEREFORE, and in accordance with all of the foregoing, we enter the following:

ORDER

AND NOW, to wit: this 13th day of APRIL, 1973, it is

ORDERED AND DECREED

(1) That respondent, NATHAN BERLANT, is suspended from the practice of law for a period of five (5) years from the effective date of this Order.

(2) That application for reinstatement at the end of the suspension period shall be filed in accordance with the Rules of Disciplinary Enforcement of the Supreme Court of Pennsylvania pertaining to suspended attorneys.

(3) Respondent shall comply with the provisions of Rule 17-17 of the Rules of Disciplinary Enforcement of the Supreme Court of Pennsylvania pertaining to suspended attorneys.

(4) Notice of this Order and Decree is to be given to the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania and the Municipal Court of Philadelphia County, through the respective Clerks of Court; the Administrator of the

Opinion of the Court of Common Pleas

Court of Common Pleas of Philadelphia County, the Clerk of Quarter Sessions Court of Philadelphia County, the City Solicitor of Philadelphia County, the Sheriff of Philadelphia County, and the Clerk of the United States District Court for the Eastern District of Pennsylvania.

BY THE COURT:

s/ Ethan Allen Doty
Ethan Allen Doty, A.J.

s/ John J. McDevitt, 3rd
John J. McDevitt, 3rd, J.

s/ Samuel H. Rosenberg
Samuel H. Rosenberg, J.

Dated: April 13, 1973

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

In Re: NATHAN BERLANT

No. 348 January Term, 1973

Appeal from the Order of the Disciplinary Court of the Court of Common Pleas for the County of Philadelphia

Entered: April 13, 1973

JONES, C.J. FILED: OCTOBER 16, 1974

By order of the Disciplinary Court of the Court of Common Pleas for Philadelphia County, appellant was suspended from the practice of law for five years.[1] The basis for that order was the court's finding of his guilt with regard to fifteen instances of improper solicitation of cases, ten instances of filing false contingent fee agreements, five instances of making improper advances to clients, two instances of impeding the court's investigation, two instances of submitting false medical bills, one instance of subornation of perjury, and failing to make

1. On May 3, 1973, we granted appellant's Petition for Supersedeas, thereby staying that order pending final disposition of this appeal.

timely filings of one hundred ten contingent fee agreements and twenty-one statements of distribution. This matter is before us upon direct appeal pursuant to the Act of May 19, 1879, P.L. 66, § 1, 17 P.S. § 1663.[2]

Our primary responsibility in this case is to review the record of the proceedings below. However, prior to that discussion, there are several preliminary questions which we must consider.

Initially, appellant contends that the proper standard of proof in disciplinary proceedings is the "reasonable doubt" standard. We disagree. Disciplinary proceedings are not criminal in nature; hence, the reasonable doubt standard need not apply. Moreover, the sanctions arising from such proceedings — censure, suspension, or disbarment — are not primarily designed for their punitive effects, but for their positive effect of protecting the public and the integrity of the courts from unfit lawyers. *See Moyerman's Case*, 312 Pa. 555, 563, 167 A. 579 (1933). While we recognize the severe impact that such sanctions may have on an individual's career, we are also mindful of our duty to uphold the quality and integrity of the Bar. Accordingly, we shall not require proof beyond a reasonable doubt, but shall retain the standard which this Court has consistently utilized in disciplinary cases through the years: "that a preponderance of

2. Although this section has been suspended by Rule 17-24(a)(5) of this Court, Rule 17-25 provides that Rules 17-1 to 17-24 shall *not* apply to "any special judicial investigation in existence at the time of the adoption of these Rules, which, together with any disciplinary proceedings arising therefrom, shall be concluded under the procedure established for the conduct of such investigation."

evidence is necessary to establish an attorney's unprofessional conduct and the proof of such conduct must be *clear* and *satisfactory*." *Krehel Appeal*, 419 Pa. 86, 89, 213 A. 2d 375, 377 (1965).

We now address appellant's questions relating to the type of evidence necessary to sustain certain charges herein. Generally, appellant contends that the absence of direct evidence of his involvement in certain offenses charged preclude a finding of guilt in those matters. For instance, appellant refers to a number of cases in which an associate under his employ was the person who actually prepared some of the false contingent fee agreements for which the court below held appellant responsible. Appellant's attempt to shield his guilt in this manner is unavailing. The fact that an attorney may not have dirtied his hands with the manual task of filling in forms does not necessarily relieve him of culpability any more than would the use of "runners" to avoid direct involvement in solicitation. If under the circumstances it is reasonable to infer that the action was taken at the party's direction or with his approval, the fact finder may draw such inferences to support a finding of guilt. Appellant's position is very close to the untenable proposition that a charge of professional misconduct may not rest exclusively on circumstantial evidence. This Court has upheld even the sanction of disbarment on charges proven solely by circumstantial evidence. *See, e.g., Lemisch's Case*, 321 Pa. 110, 184 A. 72 (1936); *Salus's Case*, 321 Pa. 106, 184 A. 70 (1936). Thus, appellant cannot rely on this argument for overturning any of the findings of guilt below as a matter of law.

In a related argument, appellant asserts that the charge of solicitation by runners cannot be sustained where there is no direct evidence of his payment of compensation to such runners. Again, we disagree. While the court below inferred "that the solicitors did receive something of value for their time, efforts and expense on [appellant's] behalf," this inference was unnecessary to sustain a finding of guilt. The Code of Professional Responsibility condemns such conduct without any requirement of compensation. DR 1-102 provides:

> "(A) A lawyer shall not:
>
> . . .
>
> (2) Circumvent a Disciplinary Rule through actions of another."

This section, read in light of the proscription against self-recommendation in DR 2-103, not only condemns the hiring of solicitors by attorneys but also forbids any arrangement between an attorney and solicitor for solicitation purposes or even the acquiescence of the attorney who has knowledge of a solicitor's activities in his behalf. We do not mean to suggest that the casual recommendation of an attorney by a friend or acquaintance is improper. Rather we seek to eliminate the active recruitment of clients and stirring up of litigation by or on behalf of attorneys.

Moreover, the fact that some of the solicitation for which appellant was adjudged guilty occurred prior to the effective

date of the present Code of Professional Responsibility is of no consequence. This Court has never required proof of compensation in these circumstances. *Klensin v. Board of Governance*, 312 Pa. 564, 168 A. 474 (1933), clearly indicates that proof that the accused paid "runners" is not essential to a finding of guilty of solicitation through runners. The Court there quoted with approval from the report of the hearing masters:

> "'The first charge of unethical soliciation [sic] of business is amply sustained by the evidence. It is true that respondent did not employ 'runners' at a compensation. The work of solicitation was confined to his father, who may not have received any cash consideration for the work . . . .'"

312 Pa. at 571, 168 A. at 476-77. Thus, proof of compensation is not required for a finding of guilt with regard to any of the charges of indirect solicitation.

Appellant also contends that he is entitled to a new trial because counsel for the Special Judicial Investigation started to inquire about appellant's Fifth Amendment assertion in an earlier hearing. Appellant contends that this constituted reversible error under the doctrine of *Spevack v. Kline*, 385 U.S. 511, 87 S. Ct. 625 (1967). We find this argument meritless. Counsel for appellant objected at the outset of this line of questioning before appellant had responded and his objection was sustained at that time. There was no possibility of prejudice since the objection was promptly sustained before any evidence

of appellant's prior Fifth Amendment plea could enter the record in this case.[3] Certainly, nothing in *Spevack*[4] would suggest grounds for reversal in the instant situation and accordingly, we dismiss this contention.[5]

We now turn to our major task — a review of the factual determinations of the court below. We are entrusted with this duty of de novo review by the Act of May 19, 1879, P.L. 66, § 1, 17 P.S. §1663 which provides:

> "In all cases of any proceedings in any court of this commonwealth against any attorney of said court for unprofessional conduct as an officer of such court, said attorney shall be entitled to a writ of error from the supreme court

3. Even counsel's question does not refer to a Fifth Amendment assertion. After appellant denied ever having given compensation to anyone for referring a case to him, counsel asked:

> "Do you recall being asked that same question before Judge Shoyer? Page 9."

Objection was immediately taken at that time.

4. *Spevack* held that the privilege against self-incrimination extends to disbarment proceedings and that an order of disbarment based on petitioner's assertion of that privilege must be reversed. Not even the broadest reading of this decision would suggest that reversal is required in the absence of prejudice. Moreover, the fact that the privilege against self-incrimination was never even invoked in this proceeding renders *Spevack* totally inapposite.

5. Appellee also argues that this questioning would have been proper since it was being utilized to impeach appellant by showing a prior inconsistent statement. Since the objection was sustained below at the outset, we do not even reach this question.

of this commonwealth, as in civil cases, to said court, from any judgment, order or decree of said court, against him as such officer, which writ of error shall remove the record and all of the proceedings therein to the supreme court of this commonwealth; and *it shall be the duty of said supreme court to review the same de novo;* and the complainant shall have the right to offer new testimony by deposition or otherwise as said supreme court may direct, and upon hearing said court may modify, reverse or affirm said judgment, order or decree of the court below, as the justice and equity of the case shall require, and such cases shall be placed if desired at the head of the list of the next sessions of said court in any district where it may sit, to be determined after all homicide cases have been disposed of; said writ of error shall be issued as of course within two years from the judgment, order or decree as aforesaid." (Emphasis added.)[6]

Since our review is de novo, we are not bound by the findings of the court below, but are free to evaluate the evidence presented in the record as we see fit. *Krehel Appeal,* 149 Pa. 86, 89, 213 A. 2d 375, 377 (1965). However, we do recognize the advantage which the trial court has in evaluating the credibility of witnesses before it. This factor has frequently made this Court reluctant to disturb the findings of the lower court where such findings were supported by competent evidence. *See, e.g., Smith Disbarment*

6. *See* note 2 *supra.*

Case, 376 Pa. 255, 101 A. 2d 710 (1954); *Kraus's Case*, 322 Pa. 362, 185 A. 737 (1936). However, where the disciplinary court has imposed a sanction based on evidence which, although legally "sufficient" to sustain the charge, appears manifestly unreliable to us, we will not hesitate to overturn the determination below. *See Krehel Appeal*, 419 Pa. 86, 91, 213 A. 2d 375, 377 (1965). Having established the ground rules for our review, we now turn to the evidence in this case.

The charges confronting appellant stem from two separate petitions: (1) that of the Committee of Censors involving the alleged solicitation of two of appellant's personal injury cases as well as a related charge of subornation of perjury; and (2) that of the Special Judicial Investigation involving the remaining charges which arise from some fifteen of appellant's personal injury cases. As noted above, appellant was adjudged guilty of some thirty-five different charges, not including his failure to file some one hundred ten contingent fee agreements and twenty-one statements of distribution as required by Court Rule 202 of Philadelphia County. We have carefully reviewed the entire record of the proceedings below. Because of the large number of cases and charges involved in this proceeding, we shall not recount the evidence case by case or charge by charge. We shall, however, attempt to summarize the evidence as a whole while noting specifically the basis for any disagreements with the lower court's findings.

At the outset, it should be noted that appellant did *not* deny the charges of advancing money to clients in violation of DR 5-103 (B) and the late filings in violation of Rule 202. His

arguments in justification of these violations are unpersuasive and accordingly, we shall not disturb the lower court's determination on these points,[7] but shall move on to the more serious charges presented in this case.

On the whole, we are in agreement with the lower court's findings in this case. However, there are a few instances in which we cannot concur in the disciplinary court's findings of guilt. In these instances, our bases for disagreement either go beyond questions of credibility or relate to questions of credibility which are so manifest that one can make an intelligent decision thereon merely by referring to the record. We shall note these points of variance at this time.

With regard to the charges in the Committee of Censors' petition — that appellant solicited the cases of Clarice Palmer and Viola Woodland and that he suborned the perjury of Viola Woodland both at trial and in an affidavit — we cannot concur with the findings of guilt below. The charges of solicitation arise from events which occurred in 1963, some nine years prior to the hearing in this case. Likewise, the alleged perjury, to which the subornation charges refer, relates to these same events. The

7. Appellant attempts to justify his advances on the basis of the client's indigency, since the money was generally used for rent, food, and other necessities. While this may be a mitigating factor when considering the sanction, it is irrelevant to the commission of the offense itself under DR 5-103(B).

Appellant attempts to justify his noncompliance with Rule 202 on the ground that the retainer agreements were being used to harass him. We do not find evidence of such "harassment" in the record, particularly in view of the merit of many of the more serious charges against appellant.

Committee's evidence rested heavily on the testimony of the two former clients. We find the testimony of these two witnesses to be confused, uncertain, and unworthy of belief. Although the witnesses' confusion is somewhat explainable by the lapse of time, this does not make their uncertain testimony any more reliable.[8] While we do not necessarily find appellant's evidence contrastingly more credible, we feel it would be inappropriate to base a sanction of suspension on such uncertain evidence.

Turning to the charges contained in the petition of the Special Judicial Investigation, our first point of disagreement with the court below is its finding of guilt as to the charge of submitting false medical bills in the case of Ernestine McCullough. The fact that the witness admitted lying to the defendant's doctor regarding the number of visits because she "figured if [she] told him that that [she] would probably get more money out of the accident" raises a strong possibility that she may also have lied to appellant for the same reason when he was preparing her claim. Therefore, we are unwilling to accept this charge as a basis for the sanction imposed.

With respect to the case of Pearl McNeil, we are not convinced of appellant's guilt as to the charge of solicitation. The client's testimony indicates that Mr. Batt, appellant's associate, visited Mrs. McNeil in her capacity as a possible

8. Clarice (Palmer) Chambers repeatedly admitted a "blurred mind" with respect to the events of 1963. Viola Woodland had similar problems. In addition, both witnesses were caught in numerous inconsistencies, not only with respect to prior hearings and events but between their present testimony and that of a few minutes earlier. Upon reading all the testimony by these two witnesses, one must certainly come away with a general feeling of the witnesses' confusion and uncertainty.

witness in the case of her sister's estate. At the close of that conversation, Mrs. McNeil asked Mr. Batt to represent her since he was already representing her brother-in-law in his capacity as administrator of his wife's estate. We are not convinced that a finding of solicitation is merited on these facts.

Our doubts, however, do not extend to the related charge of filing a false retainer agreement listing Mrs. McNeil's brother-in-law, Lenwood Butler, as the referring party. Although there may not have been any devious motive for listing Mr. Butler as the referring party, there is no question that this information was inaccurate since Mrs. McNeil had not spoken to Butler about retaining any lawyer prior to Mr. Batt's visit. Thus, we affirm the filing false retainer agreement charge although the significance of this charge is reduced by our inability to find the accompanying solicitation in this case.

In the case of Evelyn Pearson, we are not persuaded by the evidence on the charge of submitting false medical bills. While the witness initially indicated that the number of visits to the physician on the submitted bill, fifty-five, was erroneous and that the actual number was closer to twelve, her testimony on this point was severely impeached on cross-examination. By the end of her testimony, she conceded not only that she couldn't remember the precise number of visits but also that she wasn't even sure whether the number could have been fifty-five. For this reason, we cannot sustain the finding of guilt on the false medical bill charge.

With regard to the remaining charges, however, we are in agreement with the findings of the disciplinary court. As noted above, we are not discussing each of these remaining charges in detail, but are merely attempting a general discussion of each class of charges.

As to the twelve remaining charges of solicitation through runners, the evidence viewed as a whole reveals a pattern of runners and wreck-chasers soliciting the personal injury claims of automobile accident victims for appellant.[9] Appellant denies any involvement or arrangement with these solicitors. Nevertheless, several facts clearly support the inference that either a solicitation arrangement existed or, at the very least, that appellant knew of the solicitation when he accepted the cases: (1) the solicitor provided the victim with automobile transportation to appellant's center city office and then to the victim's home after a retainer was signed; (2) in several cases, appellant was personally introduced to the prospective client by the solicitor; and (3) in at least ten cases, retainer agreements with false referral information were filed, presumably in an attempt to cover up the solicitation (see our discussion *infra*). While proof that the runners were paid for their activity is unnecessary, we would concur in the disciplinary court's inference thereof even if such proof were required. Accordingly, we affirm the disciplinary court's findings of guilt with respect to these remaining twelve charges of solicitation.

9. James Ghilyard, an admitted solicitor of business for auto body shops, was identified by several accident victims and former clients of appellant as the person who solicited their respective cases, either at the scene of the accident or at the victim's home within a few days of the accident. Wilbur Allen was identified as a solicitor by several other victims. In the other cases, the parties making the initial solicitation included anonymous callers, unidentified runners, and in one instance, Ghilyard's wife.

Opinion of the Supreme Court of Pennsylvania

We now turn to the ten charges of filing false contingent fee agreements. Philadelphia Common Pleas Court Rule 202 (f), which requires every attorney entering into a contingent fee agreement to file a copy thereof with the Prothonotary, also requires a signed statement by the client listing the name and address of the person who recommended the attorney. In each of these cases, the client testified that the referral information was false. In several cases, the referral statements were in appellant's own handwriting. In other cases, they were filled out by appellant's associate. With respect to these latter instances, appellant strenuously objects to any finding of culpability, arguing that he had no knowledge of these actions. Nevertheless, as noted above, the drawing of reasonable inferences in disciplinary cases is quite appropriate and we agree with the disciplinary court's inference of knowledge on appellant's part with regard to these charges. We are particularly persuaded in this regard by the following argument found in the brief of the Special Judicial Investigation:

> "This was Berlant's office, it was his practice, the profits were all his, all the retainers were in his name, he participated in all phases of the cases involved, and was exclusively responsible for some phases. Berlant had no partner who could have been responsible for the day-to-day operations in his office and who could have acted without his knowledge."

Thus, we concur in the findings of guilt on these ten charges.

The only charges left to be considered are the two counts of impeding the court's investigation in violation of DR 1-102 (4) and (5).[10] In both instances, the evidence is credible and sufficient to support the determination of guilt below. In one instance appellant attempted to solicit perjury from one of his prior clients. In the other, appellant told a party, subpoenaed to appear at the office of the Special Counsel, that he need not appear. Such conduct, in our opinion, warrants the decision of the disciplinary court on these charges.

In summation, the findings of guilt are sustained as to the following charges: twelve counts of solicitation; ten counts of filing false contingent fee agreements; two counts of impeding the court's investigation; five counts of making improper advances to clients; and failure to comply with Philadelphia County Court of Common Pleas Rule 202 with respect to some one hundred ten contingent fee agreements and some twenty-one statements of distribution. On the basis of these charges, notwithstanding our disagreement with several of the disciplinary court's findings, we cannot say that the sanction imposed below is unduly harsh. Th.ough these numerous violations of the Code of Professional Responsibility's Disciplinary Rules, appellant has dishonored the legal profession. Nevertheless, the court below, mindful of appellant's previously untainted twenty-one years of practice and numerous character witnesses, chose to impose the sanction of five years' suspension. We can find no reason for reducing the severity of the sanction.

10. DR 1-102(4) prohibits a lawyer's engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. DR 1-102(5) prohibits conduct which is prejudicial to the administration of justice.

Accordingly, the order of the Disciplinary Court, suspending appellant from the practice of law for a period of five years, is hereby affirmed. Appellant to pay costs.

Mr. Justice Nix did not participate in the decision of this Case.

Mr. Justice Manderino filed a concurring and dissenting opinion.

CONCURRING AND DISSENTING OPINION OF JUSTICE MANDERINO

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

IN RE: NATHAN BERLANT

No. 348 January Term, 1973

Appeal from the Order of the Disciplinary Court of the Court of Common Pleas for the County of Philadelphia

Entered: April 13, 1973

CONCURRING AND DISSENTING OPINION

JUSTICE MANDERINO FILED: OCTOBER 16, 1974

I concur in the majority's finding of guilt on the charges of attempting to solicit perjury and of improperly advancing living expense money to clients. My concurrence on the latter charge is based *solely* on the evidence indicating that the purpose of one "loan" was not simply to enable an indigent client to withstand the rigors of a possibly protracted litigation, but was designed to (and did) influence the client — who had already retained other counsel — to dismiss his attorney and retain appellant. I concur in the court's finding that appellant failed to comply with

Concurring and Dissenting Opinion of Justice Manderino

Philadelphia Court Rule 202, regarding the filing of contingent fee agreements, but I do so for reasons not discussed in the majority opinion. These reasons will be explained later in this opinion.

I dissent from the finding of guilt for making advances to clients in those cases where the advances were made after the persons had become appellant's clients. I dissent from the finding of guilt on the charges of filing false contingent fee agreements because the evidence is insufficient to sustain the charge.

I also dissent from the court's finding of guilt for "solicitation." *NAACP v. Button*, 371 U.S. 415, 9 L.Ed. 2d 405, 83 S. Ct. 328 (1963), held that the National Association for the Advancement of Colored People, its members, *and lawyers* had a right to associate for the purpose of assisting persons who seek legal redress for infringement of their rights. The State could not under its power to regulate the legal profession prohibit such associations simply by labeling it as improper "solicitation." The court emphasized that "solicitation" is within the area of freedoms protected by the First Amendment:

> "We meet at the outset the contention that 'solicitation' is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a state cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species

> of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429, 9 L.Ed. 2d at 415-16.

Although *NAACP v. Button, supra, United Mine Workers of America v. Illinois State Bar Association et al.*, 389 U.S. 217, 19 L.Ed. 2d 426, 88 S. Ct. 353 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 12 L.Ed. 2d 89, 84 S. Ct. 1113 (1964); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 28 L.Ed. 2d 339, 91 S. Ct. 1076 (1971), have addressed themselves to the issue of collective activity designed to apprise potential clients of their legal right, there is no reason to believe that the scope of the First Amendment protections depends on whether the individual being solicited is in the company of his friends and associates.

The record in this case does not indicate that appellant ever paid money in exchange for recommendations by those who allegedly acted as "runners" for him. Such activity would involve a fraud on the consumer who accepted that kind of a "solicitation." The state undoubtedly has a substantial interest in protecting the public from fraud and other abuses likely to result if lawyers are given unrestrained freedom to solicit. However, the state's infringement on First Amendment association rights must be narrowly drawn. Any restriction of First Amendment rights must be limited to the minimum extent needed to prevent the abuses at which the regulation is directed. The fatal defect of the disciplinary code's advertising and solicitation rules is that it

indiscriminately prohibits all advertising and solicitation by members of the bar. The prevention of the abuses of a few, who might be unscrupulous in their use of such rights, cannot justify a blanket prohibition.

I believe that Philadelphia Court Rule 202, as now worded, violates the equal protection clause of the Fourteenth Amendment. Rule 202(f) requires that contingent fee agreements in death and personal injury actions, workmen's compensation claims, or land condemnation proceedings be filed with the Prothonotary. By failing to require filing of *all* contingent fee agreements between an attorney and client, the rule offends the constitution.

Contingent fee agreements have long been the subject of concern to the courts. They have been subjected to careful scrutiny to see that no unfair advantage is taken of the clients' position or lack of knowledge. *Chester County v. Barber*, 97 Pa. 455 (1881). The object of such court scrutiny is to prevent injury to the client, to proscribe a relationship subject to abuse by the attorney. The cases considering the validity of contingent fee agreements make no distinction as to the subject matter of the litigation taken pursuant to the agreement. Likewise, Rule 202 of the Pennsylvania Rules of Civil Procedure, in requiring contingent fee agreements to be in writing, applies to *all* contingent fee agreements regardless of the kind of claim or case.

The potential for abuse is present in *all* contingent fee agreements between a lawyer and client. It is not peculiar to

Concurring and Dissenting Opinion of Justice Manderino

personal injury, workmen's compensation, or land condemnation suits. Rule 202(f) unreasonably discriminates between the named cases and other contingent fee agreements, and as such, is unconstitutional. I believe, however, that the offensive provision is severable and can be stricken from the Rule. The Rule would then require that *all* contingent fee agreements be filed. I therefore concur that appellant's failure to comply with the rule warranted the court's finding of guilt for such failure to comply.

I would remand for reconsideration of the discipline.

ORDER DENYING REHEARING

SUPREME COURT OF PENNSYLVANIA

Eastern District

SALLY MRVOS
Prothonotary

LAURA E. LITCHARD
Deputy Prothonotary

PHILADELPHIA 19107

December 16, 1974

John Rogers Carroll, Esq.
27th Floor — Lewis Tower Building
Philadelphia, Pa. 19102

Re:

In the Matter of an Attorney —
Appeal of Nathan Berlant
No. 348, January Term, 1973

Dear Mr. Carroll:

This is to advise that the following Order has been endorsed on the Petition for Reargument filed in the above matter:

Order Denying Rehearing

"12/13/74

Petition denied.

Per Curiam"

Very truly yours,

s/Sally Mrvos
Prothonotary

SM: jhh
cc: William P. Stewart, Esq.
cc: Daniel I. Murphy, Esq.
cc: State Reporter
cc: West Publishing Co.

November 13, 1973 — Argued (J-362)
October 16, 1974 — Decision